FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1377

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM C. WARDLAW, PETITIONER

v.

WILLIAM R. PICKETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA L. HERWIG
WENDY M. KEATS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the defendants were entitled to qualified immunity.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Anderson v. *Creighton*, 483 U.S. 635 (1987)	11, 12
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	3
Brinegar v. *United States*, 338 U.S. 160 (1949)	15
Dixon v. *Richer*, 922 F.2d 1456 (10th Cir. 1991)	10, 11
Fundiller v. *City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985)	13
Graham v. *Connor*, 490 U.S. 386 (1989)	4, 6, 8
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	4, 11, 12
Illinois v. *Gates*, 462 U.S. 213 (1983)	15
Imbler v. *Pachtman*, 424 U.S. 409 (1976)	12
Martin v. *Malhoyt*, 830 F.2d 237 (D.C. Cir. 1987)	4
O'Neill v. *Krzeminski*, 839 F.2d 9 (2d Cir. 1988)	13
United States v. *Heid*, 904 F.2d 69 (D.C. Cir. 1990)	3
Webb v. *Hiykel*, 713 F.2d 405 (8th Cir. 1983)	14

Constitution and statute:

U.S. Const.:	
Amend. IV	4, 11
Amend. V	4
Amend. IX	4
18 U.S.C. 111	3, 14

Miscellaneous: Page

1 Restatement of the Law (Second) Torts (2d ed. 1965) .. 9

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1377

WILLIAM C. WARDLAW, PETITIONER

v.

WILLIAM R. PICKETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 1 F.3d 1297. The opinions of the district court (Pet. App. 17a-26a, 28a-29a) are unreported.

JURISDICTION

The court of appeals entered judgment on September 10, 1993, and denied rehearing on December 6, 1993. The petition for a writ of certiorari was filed on March 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 7, 1988, petitioner William Wardlaw and his friend John Heid attended a federal district court hearing in a courtroom on the sixth floor of the United States Courthouse in Washington, D.C. Security in the courtroom was high because the hearing involved conditions in a women's prison and the Marshal's Office had learned that a demonstration might occur. Deputy Marshal Donald Horton observed that Heid, who was seated on a bench in the public section of the courtroom, failed to stand both when the judge left the bench for a recess and when he reentered the courtroom. Deputy Horton asked Heid to stand, but Heid responded that he stood for no one but God. Pet. App. 2a-3a, 17a-18a.[1]

Deputy Horton then asked Heid to leave the courtroom. Heid refused, and said that he would leave only if carried out. Horton summoned respondent Deputy Marshal Albert Crew to assist him in removing Heid. When the deputies took hold of Heid, he went limp. Horton and Crew carried Heid from the courtroom, and Horton instructed Crew and Deputy Marshal William Pickett, the other respondent, to escort Heid out of the courthouse. Pet. App. 3a, 18a.

Respondents Pickett and Crew then carried Heid, who remained limp, to the stairwell. Petitioner Wardlaw, who had witnessed these events, followed. When Wardlaw entered the stairwell, he saw Pickett

---

[1] For purposes of the respondents' motion for summary judgment, the district court and the court of appeals viewed the facts in the record and the inferences to be reasonably drawn therefrom in the light most favorable to petitioner. Pet. App. 2a, 12a, 15a-16a.

holding Heid "like a sack of potatoes" and dragging him on his back down the stairs. Pet. App. 3a, 18a; Pet. 3. When the deputies and Heid had reached a landing halfway to the fifth floor, Wardlaw saw Pickett kick and punch Heid in the face with no apparent provocation or response from Heid. Wardlaw rushed down the stairs and called out, "Don't hurt him please. He is totally nonviolent." Pet. App. 3a, 18a; Pet. 3.

As Wardlaw approached Pickett, Pickett turned and punched him once in the jaw and two or three times in the chest and shoulder. Pet. App. 3a, 18a; Pet. 3-4. Heid, still in Crew's grasp, unsuccessfully tried to place himself between Wardlaw and Pickett. Pet. App. 3a, 18a; Pet. 3. Heid told Wardlaw to get the deputies' names. Pickett said to Crew, "We better charge them with assault." Pet. App. 3a; Pet. 4. After the confrontation, Wardlaw refused medical treatment, but he maintained that he experienced substantial pain in his chest and jaw over the next several months. Pet. App. 4a; Pet. 4 n.3.

The deputies arrested Wardlaw and Heid, who were then charged with assaulting a federal officer engaged in the performance of his duties in violation of 18 U.S.C. 111. Pet. App. 3a, 19a; Pet. 5. Heid was convicted of assaulting Deputy Pickett, and Wardlaw was acquitted. Pet. App. 4a, 19a; Pet. 5 (citing *United States* v. *Heid*, 904 F.2d 69 (D.C. Cir. 1990)). Heid filed no civil action challenging the constitutionality of his arrest or prosecution.

2. Wardlaw brought this suit seeking damages against Pickett and Crew under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), for alleged violations of his constitutional rights. He

contended that respondents used excessive force in arresting him in violation of the Fourth Amendment, and that he was subjected to false arrest and malicious prosecution in violation of the Fifth Amendment.[2] The district court granted summary judgment for respondents on both claims. Pet. App. 22a-25a.

a. The court granted judgment on the Fourth Amendment claim on the ground that, in view of the totality of the circumstances as Wardlaw presented them, Crew's and Pickett's actions toward Wardlaw were not objectively unreasonable under *Graham* v. *Connor*, 490 U.S. 386 (1989). The challenged conduct was therefore not so clearly unlawful as to deprive the deputies of qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and *Martin* v. *Malhoyt*, 830 F.2d 237, 253-254 (D.C. Cir. 1987). Pet. App. 22a, 24a, 25a.

Wardlaw moved for reconsideration, contending that the evaluation of the reasonableness of the force used against him must take into account his common-law privilege to defend Heid against excessive force. That privilege, in Wardlaw's view, rendered the deputies' force against him unreasonable, and also negated any immunity the deputies might otherwise have had. The court denied that motion on the ground that Wardlaw "was certainly aware that Pickett was a United States Marshal," and therefore "had no

---

[2] Petitioner's additional claim of a Ninth Amendment violation was dismissed by the district court, Pet. App. 24a, and he has not pursued it. Petitioner also initially asserted claims against the United States under the Federal Tort Claims Act, which he has since withdrawn. Pet. 5 n.6.

privilege to intervene in the arrest of Heid." Pet. App. 29a.

b. The district court rejected the claims of false arrest and malicious prosecution on the ground that, "[e]ven under the most favorable review of the facts of this case, [petitioner] has failed to make out an actionable claim of fifth amendment proportions." Pet. App. 23a. Wardlaw could point to "no evidence of malice or bad faith on the part of the marshals." *Ibid.* The court concluded that, in light of all the circumstances, "there certainly appears to have been probable cause to arrest Wardlaw and Heid for their role in the disruption." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-16a. The court assumed the existence of the privilege to protect Heid that Wardlaw asserted, *id.* at 6a-8a,[3] but disagreed about its effect on the excessive force claim: "We reject Wardlaw's contention that the privilege to intervene in an arrest to protect the arrestee may be used as a sword to impose liability on an officer who allegedly uses excessive force against the intervenor." *Id.* at 7a-11a, 15a. The court held that the common-law privilege to intervene to prevent the use of excessive force is, where it is recognized, "a defense to the intervenor's criminal and civil liability," not "a means of imposing liability on law enforcement officers." *Id.* at 7a. The court explained that "using the privilege to assess a law enforcement officer's liability would create a framework for

---

[3] The court noted, however, that "some jurisdictions extend the privilege only to situations in which an officer uses excessive force capable of causing death or serious bodily injury." Pet. App. 8a.

excessive force claims that places unrealistic and unjustifiable burdens on the officer." *Id.* at 9a. Incorporating the privilege into the reasonable force analysis would produce the unacceptable result of requiring an officer in Pickett's shoes to determine:

> (1) whether he had used unreasonable force against Heid, (2) whether Wardlaw was rushing at him in order to intervene in the application of force or instead to attack him, (3) whether Wardlaw intended to use force against him, (4) whether the force Wardlaw was about to use was likely to be proportional to the force he had used on Heid and, finally, based on the officer's earlier conclusions, (5) whether he had any right to resist.

Id. at 9a-10a.

Instead of tailoring a new excessive-force standard for cases that might implicate a common-law privilege, the court simply held that the reasonableness standard of *Graham* v. *Connor*, 490 U.S. at 397, governs in all contexts. Pet. App. 10a, 15a. "[W]hatever the circumstances prompting law enforcement officers to use force, whether it be self-defense, defense of another or resistance to arrest, when, as here, a fourth amendment violation is alleged, the inquiry remains whether the force applied was reasonable." *Id.* at 10a.

Applying that standard to Wardlaw's version of the facts, the court concluded that Pickett's use of force to resist Wardlaw's intervention was "not so excessive that no reasonable officer could have believed in the lawfulness of his actions." Pet. App. 12a. In reaching that conclusion, the court considered the

following circumstances: (1) There was heightened security in the courtroom and the possibility of a demonstration, making it reasonable for Pickett to anticipate a confrontation in removing an uncooperative spectator from the courthouse; (2) Pickett and Crew were caught in a vulnerable position in the bend of a stairwell trying to move an uncooperative individual when Wardlaw rushed down the stairs toward them; (3) Wardlaw shouted at the deputies as he approached them, raising a reasonable fear that he was about to attack; (4) Pickett hit Wardlaw no more than three or four times in rapid succession; (5) as soon as Wardlaw sat down on the stairs and no longer appeared to be attacking, Pickett stopped using force; and (6) Wardlaw's injury was not so severe as to require medical attention. *Ibid.* The court concluded that, "[g]iven these undisputed facts, we believe that no reasonable jury could find that Pickett's use of force was so excessive that no reasonable officer could have believed it to be lawful." *Id.* at 12a-13a.

The court also affirmed summary judgment in Crew's favor on Wardlaw's excessive-force claim against him. Pet. App. 13a. The claim against Crew was based solely on Crew's inaction. Wardlaw contended that Crew's failure to prevent Pickett from using unreasonable force against Heid created the need for Wardlaw to intercede to protect Heid, which in turn made Wardlaw vulnerable to Pickett's blows. In view of the brevity of the entire confrontation, which by Wardlaw's own account lasted only ten to 15 seconds, the court found that "no reasonable jury could conclude that Crew's inaction was such that a reasonable officer could not have thought it lawful." *Ibid.* There was no basis from which to conclude that,

had Crew acted differently, he could have separated Pickett and Heid "any faster than their own actions and reactions did." *Ibid.*

Finally, the court upheld judgment against Wardlaw on his false arrest and wrongful prosecution claims against both Pickett and Crew. Pet. App. 13a-15a. It held that the deputies had probable cause to arrest Wardlaw for assault because it was reasonable under the circumstances for them to conclude that Wardlaw was about to assault them. *Id.* at 13a-14a. "Pickett's immediate confrontation with Wardlaw did nothing to negate that inference." *Id.* at 14a. Alternatively, the court held that even if in hindsight the officers lacked probable cause, they were protected by qualified immunity because their belief that they had probable cause was objectively reasonable under the circumstances. *Ibid.* The court concluded that, because the absence of probable cause is an essential element of a wrongful prosecution claim, that claim, too, must fail. *Id.* at 15a.

ARGUMENT

1. Petitioner Wardlaw asks this Court to review the court of appeals' application of *Graham* v. *Connor*, 490 U.S. 386 (1989), to the facts of this case. The court of appeals held that the challenged use of force against Wardlaw was reasonable under the circumstances. Wardlaw's disagreement with this fact-bound determination does not warrant further review.

The common-law privilege that Wardlaw asserts could not, even were it incorporated into federal law, affect the reasonable-force determination in the

manner Wardlaw urges.[4] Wardlaw contends that "Marshal Pickett's punching of Mr. Wardlaw * * * was unlawful because under § 72 [of the Restatement (Second) of Torts] he had no privilege to use *any* force against Mr. Wardlaw." Pet. 14 n.12.[5] Wardlaw's privilege and Pickett's corresponding lack of privilege should, in Wardlaw's view, create a rule of strict liability, under which Pickett, as the initial aggressor, is liable if he uses any force whatsoever against Wardlaw while Wardlaw defends an excessive-force victim.

---

[4] Wardlaw's assertion of privilege rests chiefly on § 76 of the Restatement (Second) of Torts, which states:

§ 76. Defense of Third Person

The actor is privileged to defend a third person from a harmful or offensive contact or other invasion of his interests of personalty under the same conditions and by the same means as those under and by which he is privileged to defend himself if the actor correctly or reasonably believes that

(a) the circumstances are such as to give the third person a privilege of self-defense, and

(b) his intervention is necessary for the protection of the third person.

1 Restatement of the Law (Second) Torts (2d ed. 1965).

[5] Restatement (Second) of Torts § 72 states:

§ 72. Defense Against Privileged Action

The actor is not privileged to defend himself against any force or confinement which the other is privileged for any purpose to inflict upon the actor except where the other's privilege is based upon a reasonable mistake of fact not caused by the fault of the actor.

1 Restatement of the Law (Second) Torts (2d ed. 1965).

As the court of appeals correctly pointed out, however, the common-law privilege is a shield, not a sword. Pet. App. 9a, 15a. While it may protect Wardlaw from incurring liability for any harm resulting from his reasonable, good-faith effort to help out an individual he reasonably perceives to be in danger, it does not render other people liable where they would not be otherwise. Even assuming Pickett's resistance to Wardlaw's intervention is not privileged, an absence of privilege (*i.e.* common-law immunity from suit) does not in and of itself create liability in Pickett. What the court of appeals found missing was any use of force by Pickett causing him to be liable to Wardlaw under *Graham*'s objective reasonableness standard. Wardlaw's privilege-based attack on the lower court's decision fails to address that deficiency.

The fact-bound nature of Wardlaw's disagreement with the decision below is underscored by his contention that the decision conflicts with *Dixon* v. *Richer*, 922 F.2d 1456 (10th Cir. 1991). *Dixon*, however, applied precisely the same legal standard as did the court of appeals in this case. Petitioner mischaracterizes *Dixon* as "reflect[ing] the consistency between the Fourth Amendment test of objective reasonableness and the common law principle holding an attacker liable to an intervenor who properly aids the attacker's victim." Pet. 17. There was, however, no assertion nor discussion in *Dixon* of any common-law privilege, whether of self-defense, defense of another, or otherwise.[6] The court in that case simply

---

[6] *Dixon* was decided after the events at issue in this case. Its holding thus could not conceivably be viewed as creating

applied *Graham*, as did the court of appeals here, but came to a contrary conclusion in the context of a greater use of force.[7]

Wardlaw's suggestion that Pickett's lack of common-law privilege deprives Pickett of qualified immunity is just as untenable as Wardlaw's assertion that his privilege and Pickett's lack thereof created liability. Even assuming, *arguendo*, the existence of a privilege in Wardlaw and the absence of any privilege applying to Pickett, see Brief Amicus Curiae Of Twenty-Nine Tort And Constitutional Law Professors Supporting Petitioner, the court of appeals correctly held that Pickett's qualified immunity under *Harlow* v. *Fitzgerald* does not depend on the existence in each case of an underlying common-law privilege. Pet. App. 11a-13a, 15a.

The theory that qualified immunity should be unavailable for actions that would not be privileged under common law was addressed, and rejected, in *Anderson* v. *Creighton*, 483 U.S. 635 (1987). The Creightons raised a Fourth Amendment challenge under *Bivens* to the FBI's warrantless search of

---

clearly established rights of which, under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), repondents should have known.

[7] The officers in *Dixon* stopped a couple to ask whether they knew the whereabouts of a suspect, but when the husband, Willie Dixon, asked why they were stopped, the officers did not inquire about the suspect. Instead they kicked Dixon repeatedly, and as he started to fall, struck him in the stomach with a flashlight, and, when he was on the ground, choked and beat him. 922 F.2d at 1458. When the wife, Hylon Dixon, screamed at the officers not to hurt her husband, they knocked her to the ground, stepped on her and twisted her arm up behind her neck. *Ibid.*

their home. Because officers conducting warrantless searches of innocent third parties' homes in search of fugitives were strictly liable at English common law if no fugitives were present, the Creightons urged that a similar rule be incorporated under *Harlow* to deprive the FBI of qualified immunity. *Id.* at 644.

This Court in *Anderson* was "unwilling to Balkanize the rule of qualified immunity by carving exceptions at the level of detail" urged in that case. 483 U.S. at 646. The Court explained that although *Harlow*'s recognition of qualified immunity is consonant with the common-law tradition,[8] "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 645. Rather, the qualified immunity established under *Harlow* embodied a "general principle" to be applied "across the board." *Ibid.*, quoting *Harlow*, 457 U.S. at 815-820. *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson*, 483 U.S. at 645, citing *Harlow*, 457 U.S. at 815-820.

Imbler v. *Pachtman*, 424 U.S. 409 (1976), upon which Wardlaw also relies, is not to the contrary. *Imbler*, like *Dixon*, does not mention or rely in any way on a common-law privilege as a means of creating liability or piercing an immunity defense. Rather, in applying absolute prosecutorial immunity to a prosecutor who knowingly used perjured testimony,

---

[8] *Anderson*, 483 U.S. at 644; see *Harlow*, 457 U.S. at 806.

the Court in *Imbler* held that a prosecutor's immunity under federal law is generally supported by the same policy interests underlying the common-law immunities of judges and grand jurors. *Id.* at 422-429. *Imbler* did not hold that an exception should be carved out of the prosecutor's immunity in each instance in which there would be no common-law privilege.

2. The court of appeals' application of the objective reasonableness standards of *Graham* and *Harlow* to Wardlaw's claim against Deputy Marshal Crew for failure to restrain Pickett was also correct. Crew's potential liability for inaction is not even presented in this case in light of the court of appeals' determination that Pickett's use of force against Wardlaw was objectively reasonable. The court of appeals correctly concluded, on the facts as Wardlaw presented them, that "no reasonable jury could conclude that Crew's inaction was such that a reasonable officer could not have thought it lawful." Pet. App. 13a.

The court of appeals did not hold, as Wardlaw suggests it did, that an officer who fails to prevent the use of excessive force is not liable under any circumstances. Pet. 18. The decision below is fully consonant with decisions in other circuits holding officers liable for failing to prevent uses of force where the force was so clearly unlawful that no reasonable officer on the scene could have concluded otherwise. *O'Neill* v. *Krzeminski*, 839 F.2d 9 (2d Cir. 1988) (holding officer not liable for initial beating he observed, but ordering a new trial regarding his failure to prevent further abuse of beating victim); *Fundiller* v. *City of Cooper City*, 777 F.2d 1436, 1441-1442 (11th Cir. 1985) (holding officers liable for failing to intercede while victim of unprovoked police

shooting was subjected to additional mistreatment that exacerbated his wounds); *Webb* v. *Hiykel*, 713 F.2d 405 (8th Cir. 1983) (remanding for consideration whether officer who accompanied other officers found to have used excessive force was liable for failure to prevent it).

3. This case presents no issue of general importance regarding whether Wardlaw's claims of false arrest and malicious prosecution were properly dismissed. Wardlaw contends that probable cause to arrest him could not have existed because he had a common-law privilege to defend Heid from excessive force, and therefore could not have been criminally liable for interceding, and that the deputies should have been aware of that privilege and accordingly not arrested him. Pet. 19-20. The court of appeals correctly held, however, that the deputies could have had probable cause to arrest and charge Wardlaw for assaulting federal officers in violation of 18 U.S.C. 111,[9] even if Wardlaw were privileged. Pet. App. 13a-14a.

---

[9] 18 U.S.C. 111 provides in relevant part:

> Assaulting, resisting, or impeding certain officers or employees
>
> (a) IN GENERAL. -Whoever-
>
> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [specified federal officers, including deputy United States Marshals] while engaged in or on account of the performance of official duties
>
> * * * * *
>
> shall be fined under this title or imprisoned not more than three years, or both.

The court of appeals' decision rests on a fact-specific determination that the privilege, however well established it may have been, was not so clearly applicable to the facts of this case that any reasonable officer in the deputies' position would have known that Wardlaw was privileged. On the contrary, in the circumstances of this case the deputies could have reasonably concluded that Wardlaw appeared on the scene, not as a white knight coming to Heid's rescue, but as an intermeddler who was about to assault them. Pet. App. 14a. Probable cause is a "practical, non-technical conception," *Illinois* v. *Gates*, 462 U.S. 213, 231 (1983), quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949), which law enforcement officers must apply without benefit of hindsight. Even if the officers' belief that they had probable cause to arrest Wardlaw was incorrect, it was not so far wrong that no reasonable officer could have agreed with it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
WENDY M. KEATS
Attorneys

MAY 1994